809.

# SUPREME COURT OF THE UNITED STATES.

## No. 156.

WM. B. SMITH, EDMOND MATTOX, AND JAS. SLOANE, APPELLANTS,

vs.

JOHN WARBURTON, HEZEKIAH KING, JOB P. DOANE, AND WILLIS KING, PARTNERS, &c., UNDER THE FIRM AND STYLE OF WARBURTON AND KING.

APPEAL FROM THE SUPREME COURT OF IOWA TERRITORY.

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J. & G. S. GIDEON, printers.

UNITED STATES OF AMERICA,
*Territory of Iowa, ss:*

Pleas held before the honorable Charles Mason, chief justice, and Joseph Williams and Thomas S. Wilson, associate justices, of the supreme court, in and for the Territory of Iowa, at Iowa city, on the day of January, A. D. 1844.

John Warburton, Hezekiah King, Job P. Doane and Willis King, partners under the firm and style of Warburton & King,
*against*
Edmund Mattox, William Smith, and James Sloan.

In chancery—An appeal from a decree of the district court of Dubuque county.

Be it remembered that heretofore, to wit, on the 17th day of January, A. D. 1843, the plaintiff filed in the clerk's office of the supreme court in and for the Territory aforesaid, the following transcript of the record and proceedings had in the district court of Dubuque county, between the parties therein named, to wit:

*Transcript.*

Pleas before the Hon. Thomas S. Wilson, associate judge of the supreme court of Iowa, and judge of the third judicial district of Iowa, holden in the city of Dubuque, at the February term, in the year of our Lord one thousand eight hundred and forty-two. Witness—

THOMAS S. WILSON, *Judge.*
WARNER LEWIS, *Clk.*
GEO. W. CUMMINS, *Sheriff.*

TERRITORY OF IOWA, *Dubuque county, ss:*

Be it remembered, that on the eleventh day of April, A. D. 1841, John Wharburton, Hezekiah King, Job P. Doane and Willis King, partners under the firm of Warburton & King, by their solicitors, Davis & Crawford, filed in the office of the clerk of the district court for the county of Dubuque aforesaid, their bill to foreclose mortgage, in the words and figures following, to wit:

*Bill.*

To the honorable the judge of the district court for the county of Dubuque, in the Territory of Iowa, in chancery sitting:

Humbly complaining, sheweth unto your honor, your orators, John Warburton, Hezekiah King, Job P. Doane and Willis King, partners, trading and doing business under the firm and style of Warburton and King, of St. Louis, Missouri, that heretofore, to wit, on the 24th day of March, 1840, Edmond Mattox, of the town of Dubuque, in the county

of Dubuque aforesaid, being indebted to your orators in the sum of eight hundred and ninety-five dollars and fifty-four cents, executed to your orators his promissory note, bearing date the same day and year aforesaid, and thereby, twelve months after the date thereof, promised to pay to the order of your orators, by the style and description of Warburton & King aforesaid, the said sum of eight hundred and ninety-five dollars and fifty-four cents, with ten per cent. interest on the same, for value received; all of which by said note, a copy of which is hereunto annexed, reference being thereto had, will more fully appear.

Your orators further shew unto your honor, that for the better securing the payment of the said note, the said Edmund Mattox, whom your orators pray may be made defendant to this bill, mortgaged to your orators, by his deed of indenture, signed by his name, sealed with his seal, and duly acknowledged, the following real estate, situated in the town of Dubuque aforesaid, and therein described as "twenty feet of land on the north part of lot number nine (9,) bounded on the north by a lot owned by Booth and Martin, fronting twenty feet on Main street, and running back to the alley, and being a part of the lot upon which Fossett and Sherman have their store, and is the store now occupied by John Stoddard, and heretofore purchased by the party of the first of Fossett and Sherman, said lot is situate in the town of Dubuque"—which said deed has annexed and underwritten a condition and defeasance, in substance as follows—"Provided always, these presents are upon this express condition, that if the said party of the first part (the said Edmund Mattox,) his heirs, executors or administrators, shall pay, or cause to be paid, to the said party of the second part, your orators, their heirs, executors, administrators or assigns, the sum of eight hundred and ninety-five dollars and fifty-four cents, one year from the day of the date of these presents, together with ten per cent. interest on the same, then and from thenceforth these presents, and every thing herein contained, shall cease and be void, any thing herein contained to the contrary notwithstanding"—all of which by said deed, and which is herewith filed, and prayed to be taken as a part of this bill, reference being thereto had, will more fully and at large appear.

Your orators further state to your honor, that as they are informed and believe to be true, since the making of said note and deed of mortgage above recited, to your orators, by the said Edmond, he has executed to William Smith and James Sloane, of Dubuque aforesaid, two several mortgages upon the same specific property mortgaged to your orators, to secure to them severally the payment of divers large sums of money, alleged to be due by the said Edmond to them, and which last mentioned mortgages have been executed, since the mortgage aforesaid to your orators has been duly recorded in the recorder's office of Dubuque county aforesaid; and your orators pray that the said Smith and Sloane may also be made defendants to this bill. Your orators further shew unto your honor, that the said Edmond, although often requested so to do, hath not paid to your orators any part of the money due them by the mortgage aforesaid, but that the same and the interest

accruing thereon, remains wholly due and unpaid; and they further state, that the said Edmund, so far as they are concerned, has remained in the use and occupation of said house and lot. Your orators further shew unto your honor, that they have applied to the said Edmond, and to the said Smith and Sloane, to redeem the mortgage from the said Mattox to your orators, by paying to them the amount due thereon, which they have wholly and entirely failed and refused to do, and which reasonable request of your orators they well hoped the said defendant would have complied with.

But now, so it may please your honor, the said defendant, contriving and confederating to with divers persons unknown to your orators, but who, when discovered, your orators pray may be made defendants to this bill, how to deceive and defraud your orators in this behalf, wholly and entirely refuse to pay your orators any part of the money so due them as aforesaid, sometimes pretending your orators have no right to or interest in said mortgaged property, and that they can hold the same free of all claim or demand of your orators; all of which actings and doings of said defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators; and forasmuch as your orators are wholly remidiless in the premises, by the strict rules of the common law, and only relievable in a court of equity, where matters of this kind are cognizable and relievable; to the end, therefore, that the said defendants may full, true and perfect answer make to all and singular the matters and things herein contained, as fully and particularly as if the same were here again repeated, and they thereto particularly interrogated; and more especially, that the said Edmond may state whether he did not execute the note herein before set forth to your orators. Whether he did not execute to your orators the deed of mortgage as herein before stated and set forth. Whether the entire sum of money, in said deed of mortgage specified, does not remain wholly due and unpaid; and that the defendants may state, whether mortgages have not been executed to them by the said Edmond, upon the same property mortgaged to your orators as herein before stated, and the date of said mortgages; and that by a decree of this honorable court, the said defendants may be decreed to pay to your orators the sum of money due them, and the interest accruing thereon in said mortgage from said Edmond to your orators stated; or in default thereof, that they may stand forever barred and foreclosed from all equity and right of redemption of said property, and that the equity of redemption to said mortgaged property may be foreclosed, and that the same may be sold to pay to your orators the sum aforesaid due them on said mortgage; and to grant to your orators such other and further relief as to your honor may seem meet, and to equity may appertain.

May it please your honor to grant to your orators the writ of subpœna, &c., commanding said defendants to be and appear in this honorable court, to answer, &c.

And your orators will, as in duty bound, ever pray, &c.

DAVIS & CRAWFORD,
*Solicitors for complainants.*

$895 $\frac{54}{100}$. *Note.*—Copy of Note.

Twelve months after date, I promise to pay to the order of Warburton & King, the sum of eight hundred and ninety-five dollars fifty-four cents, with ten per cent. interest on the same, for value received. Dated Dubuque, March 24th, 1840.

(Signed) EDMOND MATTOX.

1840, March 24. Due, - - - - - $895 54
Inst. at 10 per ct. to Feb'y 17th.
1842, 1—10 m. 23 days.

*Mattox to Warburton & King—Mortgage.*

This indenture, made this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and forty, between Edmond Mattox, of Dubuque, Iowa Territory, of the first part, and John Warburton, Hezekiah King, Job P. Doane and Willis King, of the second part, witnesseth: that the said party of the first part, for and in consideration of the sum of eight hundred and ninety-five dollars and fifty-four cents, to him in hand [paid] by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents does grant, bargain and sell, unto the said party of the second part, and their heirs and assigns, forever, twenty feet of land, on the north part of lot number nine (9,) bounded on the north by a lot owned by Booth and Martin, fronting twenty feet on Main street, and running back to the alley, and being a part of the lot upon which Fassett and Sherman have their store, and is the store now occupied by John Stoddart, and heretofore purchased by the said party of the first part of Fassett & Sherman; said lot is situated in the town of Dubuque. *To have and to hold* the premises aforesaid, with all the privileges and appurtenances thereunto belonging, or in any way appertaining, to him the said party of the first part, and his heirs and assigns forever: Provided, always, that these presents are upon this express condition, that if the said party of the first part, his heirs, executors or administrators, shall pay, or cause to be paid, to the said party of the second part, their heirs, executors, administrators or assigns, the sum of eight hundred and ninety-five dollars and fifty-four cents, one year from the date of these presents, together with ten per cent. interest on the same, then and from thenceforth these presents, and every thing herein contained, shall cease and be void, any thing herein contained to the contrary, notwithstanding.

In witness whereof I have hereunto set my hand and seal, this day and year above written.

EDMOND MATTOX.

Signed, sealed, and delivered in presence of—
J. V. BERRY,
P. S. DADE.

On the back of which said bill is the following endorsement, to wit: "Filed, April 1st, 1841. PHIL. S. DADE, *Clk D. C.*"

Thereupon a subpœna in chancery issued out of the clerk's office of said court, in the words and figures following, to wit:

*Subpœna.*

TERRITORY OF IOWA, *Dubuque county, ss:*

To the sheriff of said county, greeting:

In the name of the United States of America, you are hereby commanded to summon Edmond Mattox, William Smith and James Sloane, if to be found within your county, to be and appear before the district court in and for the county of Dubuque and Territory aforesaid, on the first day of the next term thereof, to be holden in the town of Dubuque, in and for said county, on the 1st Monday in May, 1841, to answer the certain matters and things contained in a certain bill of complaint exhibited against them, by John Warburton, Hezekiah King, Job P. Doane and Wyllis King, partners, &c., on the *chancery* side of said court alleged. Hereof fail not, and of this writ and your service make due return to our said district court, on the first day of the next term thereof.

Witness the Hon. Thomas S. Wilson, judge of our said court, at Dubuque, this first day of April, A. D. 1841.

[SEAL.]

PHIL. S. DADE, *Clk D. C.*

On the back of said writ is the return of the sheriff of said county, in the words and figures following, to wit:

*Sheriff's return.*

"Served, by delivering attested copies of this precept to Edmond Mattox and William Smith, and by leaving an attested copy at the usual place of abode of James Sloan, with a person over the age of fifteen years, and explained the nature thereof, this 19th day of April, A. D. 1841.

G. W. CUMMINS, *Sh'ff D. C.*

On the 4th day of May, A. D. 1841, one of the said defendants, William B. Smith, impleaded with Edmond Mattox and James Sloane, defendants to the bill of complaint of John Warburton, Hezekiah King, Wyllis King and Job P. Doane, complainants, filed his answer, in the words and figures following, to wit:

*Answer of W. B. Smith.*

TERRITORY OF IOWA, *county of Dubuque, ss:*

District court, Dubuque county, to May term, 1841. In chancery.

The separate answer of Wm. B. Smith, impleads with Edmond Mattox, James Sloane, defendants to the bill of complaint of John Warburton, Hezekiah King, Wyllis King and Job P. Doane, complainants.

The defendant ever and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage of exceptions that can or may be had or taken, to the many errors, uncertainties, insufficiencies, and other imperfections in the said complainant's said bill of complaint contained, for answer hereunto, or unto so much thereof, as

this defendant is advised is material or necessary for him to make answer unto, answereth and saith: that he neither admits nor denies that the said Edmond Mattox executed a mortgage to the complainants, as in their bill of complaint alledged. And this defendant, further answering, says, that on the 4th day of April, in the year of our Lord one thousand eight hundred and forty, Thomas C. Fassett and Robert D. Sherman, entered the lot of land described in the complainant's bill of complaint, as mortgaged to them by Edmond Mattox, in the land office at Dubuque, and procured title for the same from the United States; which said entry was long subsequent to the time that the mortgage was executed by the said Mattox to the complainants, as they alledge in their bill of complaint. And this defendant further answering, says, that on the seventh day of April, in the year of our Lord one thousand eight hundred and forty, Thomas C. Fassett, Mary A. Fassett, his wife, and Robert D. Sherman, executed a warranty deed for said lot of land, to Edmond Mattox, one of the defendants, and which is hereunto annexed as schedule "A," and which this defendant prays may be taken as a part of his answer.

And this defendant further answering, says, that on the fifteenth day of April, in the year of our Lord one thousand eight hundred and forty, the said Edmond Mattox was indebted to him in a large sum of money, to wit, in the sum of one thousand and eighty-six dollars, and which was then due and owing this defendant, and had been thus due and owing from said Mattox to this defendant, for a long time.

And this defendant further answering, says, that in consideration that the said Edmond Mattox was thus indebted to him, he called upon said Mattox to secure him in the sum aforesaid; whereupon the said Edmond Mattox, upon the said fifteenth day of April, in the year aforesaid, executed to this defendant a mortgage upon the property described in the complainant's bill of complaint, to this defendant, for the purpose of securing to him the payment of the said sum of money aforesaid, payable in twelve months from the date thereof, with interest on the same, as will more fully appear by reference to said mortgage, and which is hereunto annexed, marked as schedule "B," and which the defendant prays may be taken as a part of his answer to the said complainant's bill of complaint. And this defendant further answering, says, that the said deed from Fassett and wife, and Robert D. Sherman, was duly acknowledged before an officer duly authorized to take acknowledgments, as will more fully appear by reference to said acknowledgment, hereunto annexed, and marked as schedule "C," and which this defendant prays may be taken as part of his answer.

And this defendant further answering, says, that said mortgage, executed by Mattox to this defendant, was also duly acknowledged before a proper officer, as will also appear by reference to schedule marked "D," and hereunto annexed, which this defendant prays may be taken as a part of his answer.

And this defendant further answering, says, that the deed aforesaid and mortgage aforesaid, were both duly recorded in the recorder's office,

kept in and for the county of Dubuque, the former on the eighth day of April, in the year of our Lord one thousand eight hundred and forty, and the latter on the 22d day of April, 1840, as will more fully appear, reference being had to the books of record, kept in the said recorder's office, in the county of Dubuque.

And this defendant further answering, says, that he took said mortgage in good faith, and the debt for which said mortgage was given still remains due and unpaid to him, this defendant, and that without this mortgage, his demand and claim against Edmond Mattox, would be entirely unavailable and worthless, as he believes said Mattox is at present in insolvent circumstances, and unable to pay his debts.

And this defendant further answering, says, that most of his claim against said Mattox was due and owing from said Mattox to this defendant, and long previous to the time said that mortgage is alledged to have been given by said Mattox to the complainants.

And which matters and things this defendant is ready and willing to verify, maintain and prove, as this hon. court shall direct, and hereby prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN V. BERRY,
*Solicitor and counsel for def't, William [B.] Smith.*

TERRITORY OF IOWA, *county of Dubuque :*

William B. Smith being duly sworn, says, that he has heard the foregoing answer, and that the matters therein stated are true, of his own knowledge, except those stated to be upon his information and belief; and as to those matters, he believes them to be true.

WM. B. SMITH.

Sworn and subscribed to before me, this 28th day of July, 1841.
GEO. L. NIGHTINGALL, *J. P.*

*Schedule "A."*

Fossett and Sherman to Mattox—Deed.

This indenture, made this seventh day of April, in the year of our Lord one thousand eight hundred and forty, between Thomas C. Fassit and Mary Ann, his wife, and Robert D. Sherman, of the county of Dubuque, Iowa Territory, of the first part, and Edmond Mattox, of the same place, of the second part, witnesseth: that the said party of the first part, for and in consideration of the sum of seven hundred and fifty dollars, lawful money of the United States, to them in hand paid, the receipt of which is hereby confessed and acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said party of the first part, his heirs and assigns, forever, twenty feet of land, on the north part of lot number nine (9,) bounded on the north by a lot owned by Caleb H. Booth and Thadeus O. Martin, fronting twenty feet on Main street, and running back the same width to an alley, and is a part of the lot upon which the store of the said Fassit and Sherman is situated, in the town of Dubuque. To have and to hold

the above described premises, together with the privileges and appurtances thereunto belonging, or in any wise appertaining, unto the said party of the second part, his heirs and assigns, forever; and the said party of the first part, the aforesaid premises unto the said party of the second part, his heirs and assigns, against the claim or claims of all and every person whomsoever, do and will warrant and forever defend, by these presents.

In witness whereof the said party of the first part have hereunto set our hands and seals, this day and year first above written.

THOMAS C. FASSET, [L. S.]
MARY A. FASSIT, [L. S.]
R. D. SHERMAN. [L. S.]

Signed, sealed, and delivered in presence of—
P. S. DADE,
H. F. BLYTHE.

*Schedule "C."*

TERRITORY OF IOWA, *Dubuque county, ss:*

Be it remembered, that on the 7th day of April, A. D. 1840, personally appeared before me, the undersigned, a justice of the peace in and for said county, Thomas C. Fassit and R. D. Sherman, who are personally known to me to be the persons whose names are signed to the foregoing deed, and acknowledged that they had signed, sealed, and delivered the same, for all the purposes therein mentioned; and on another day, to wit, on the 13th day of April, 1840, Mary A. Fassit (wife of said Thomas C. Fassit,) who is personally known to me, and whose name is signed to the foregoing deed, personally appeared before me, and being by me examined separately and apart from *he* said husband, and having the contents of said deed fully explained to her, she, the said Mary A. Fassit, acknowledged that she had signed, sealed, and delivered the same without fear, favor, or compulsion, from her said husband, and that she hereby relinquished her dower.

Given under my hand, this 13th day of April, 1840.

P. S. DADE, *J. P.*

On the back of which indenture are the words and figures following, to wit:

Recorded in book A, page 167, April 8th, 1840.

CHAS. CORKERY, *Dep't recorder.*

*Schedule "B."*

Mattox to Smith—Mortgage.

This indenture, made this fifteenth day of April, in the year of our Lord one thousand eight hundred and forty, between Edmond Mattox, of the county of Dubuque, Iowa Territory, of the first part, and William B. Smith, of the second part, witnesseth: that the said party of the first part, for and in consideration of the sum of ten hundred and eighty-six dollars, to him in hand paid by the said party of the second part, the re-

ceipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents does grant, bargain, and sell, unto the said party of the second part, and to his heirs and assigns, forever, all that tract, parcel of land, to wit, twenty (20) feet of land on the north part of lot number nine (9,) bounded on the north by a lot of land owned by Caleb H. Booth and Thadeus O. Martin, fronting twenty (20) feet on Main street, and running back the same width to an alley, and being a part of the lot upon which is *situate* the store of Fassit and Sherman, in the town of Dubuque, and is the same lot upon which is the store at present occupied by John Stoddard. To have and to hold the premises aforesaid, with all the privileges and appur*tan*ces thereunto belonging or in any wise appertaining, unto him, the said party of the second part, and his heirs and assigns, forever.

Provided always, that these presents are upon this express condition, that if the said party of the first part, his heirs, executors or administrators, shall pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators or assigns, the sum of ten hundred and eighty-six dollars, twelve months from the date hereof, with interest that may accrue thereon, in manner particularly specified in a note bearing even date herewith, executed by the said party of the first part to the party of the second part, then and from thenceforth these presents, and every thing herein contained, shall cease and be void, any thing herein contained to the contrary notwithstanding.

In witness whereof the party of the first part has hereunto set his hand and seal.

E. MATTOX. [L. S.]

Signed, sealed, and delivered in the presence of—
D. F. BLYTHE,
J. V. BERRY.

*Schedule "D."*

TERRITORY OF IOWA, *Dubuque county, ss:*

Be it remembered, that on the 21st day of April, A. D. 1840, personally appeared before me, the undersigned, one of the justices of the peace in and for said county, Edmond Mattox, whose name is signed to the foregoing conveyance, (and who is personally known to me) and acknowledged that he has signed, sealed, and delivered the said conveyance for all the purposes therein mentioned.

Given under my hand, the day and year above mentioned.

P. S. DADE, *J. P.*

On the back of which said indenture are the following words and figures, to wit:

Recorded in book A, page 178, April 22nd, 1840.

CHAS. CORKERY, *Dep't recorder.*

And now, on the 3rd day of August, A. D. 1841, James Sloane im pleaded with Edmund Mattox and William B. Smith, in the foregoing

suit, by J. V. Berry, his attorney, filed his answer in the words and figures, following, to wit:

*James Sloan's answer.*

TERRITORY OF IOWA, *county of Dubuque:*

District court, Dubuque county, to Aug. term, 1841, in chancery.

The separate answer of James Sloane, impleaded with Edmund Mattox and William B. Smith, defendants to the bill of complaint of John Warburton, Hezekiah King, Wyllis King and Job P. Doane, complainants. The defendant, now and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage of exception that can or may be had or taken to the many errors, uncertainties, insufficiencies and other imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much thereof as this defendant is advised is material or necessary to make answer unto, answereth and saith, that he neither admits nor denies that the said Edmond Mattox executed a mortgage to the complainants, as in the said bill alleged.

And this defendant further answering, says, that on the 4th day of April, in the year of our Lord one thousand eight hundred and forty, Thomas C. Fasset and Robert D. Sherman entered the lot of land described in the complainant's bill of complaint, as mortgaged to them by Edmond Mattox, in the land office at Dubuque, and procured a title to the same from the land office under the U. States, which said entry was subsequent to the time that the mortgage was executed by said Mattox to the complainants, as they allege in their bill of complaint.

And this defendant further answering, says, that on the seventh day of April, in the year 1840, Thomas C. Fasset, Mary A. Fasset, his wife, and Robert D. Sherman, executed a warranty deed for said land to Edmond Mattox, one of the defendants; and this deponent further answering, says, that on the 12th day of November, 1840, Edmond Mattox was indebted to him in a large sum of money, to wit, in the sum of four hundred dollars, and which was then due and owing this defendant, and had been thus due and owing from said Mattox for a long time.

And this defendant further answering, says, that in consideration that the said Edmond Mattox was thus indebted to him, he called upon said Mattox to secure him in the sum aforesaid; whereupon the said Edmond Mattox, upon the said 12th day of November aforesaid, in the year aforesaid, executed to this defendant a mortgage upon the property described in the complainant's bill of complaint to this defendant, for the purpose of securing to him the payment of the said sum of money, together with the interest on the same, payable in four months and 15 days after the date, with interest. And the defendant further answering, says, that the deed from Fassit and wife, and Robert D. Sherman, to said Edmond Mattox, has been duly recorded according to law, as has also the mortgage from him to this defendant. And this defendant further answering, says, he took said mortgage in good faith, and the

debt for which said mortgage was given, still remains due and unpaid to him, this defendant, and that without this mortgage, his demand and claim against Edmond Mattox would be entirely unavailable and worthless, as he believes said Mattox is at present in insolvent circumstances. All which matters and things this defendant is ready and willing to ver*ryfy*, maintain and prove, as this hon. court shall direct, and hereby prays to behence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

J. V. BERRY,
*Solicitor for d'ft.*

TERRITORY OF IOWA, *Dubuque county:*

James Sloane being duly sworn, says, that he has heard the foregoing answer read, and that the same is true.

JAMES SLOANE,

Sworn and subscribed to, this 28th day of July, 1841, before me.

GEO. L. NIGHTINGALL, *J. P.*

Upon the back of which said answer are the following words and figures, to wit: "Filed, August 3rd, 1841.

PHIL. S. DADE, *Clk.*"

And now at this day, to wit, on the 17th day of February, A. D. 1842, the following proceedings were had, which are in the words and figures following, to wit:

John Warburton, Hezekiah King, Job P. Doane & Wyllis King, partners under the firm and style of Warburton & King,
vs.
Edmond Mattox, William Smith, James Sloane

In chancery—Bill to foreclose mortgage.

*Decree in the district court.*

And now, this day, comes the parties, by their solicitors, and the several exhibits to the bill of complaints and answers of the defendants being by the parties aforesaid admitted to have been duly executed and recorded, the court here finds that the said Edmund Mattox executed to the said complainants the note stated in their bill, and that the payment thereof, and *and* the interest thereon accruing, was secured by the mortgage in their bill set forth; and the court is of the opinion, and further finds, that the said note and mortgage to complainants constitute a prior lien, and ought to be paid before the debts due from said Mattox to the other defendants, Smith and Sloane, out of the mortgaged property; and the court doth further find, that on said note from Mattox to complainants there is due the sum of one thousand and sixty-five dollars and forty-four cents principal, and interest at the date of this decree It is further ordered, directed, and decreed, that unless the said defendants shall, within ten days from the date of this decree, pay over to said

complainants, the said sum of one thousand and sixty —— dollars and forty-four cents, with interest thereon, at the rate of ten per cent. per annum from the date of this decree, and costs of this suit, and that they stand forever barred and foreclosed of all right of equity of redemption in the premises specified in the mortgage from said Mattox to said complainants. And it is further ordered, directed, and decreed, that in failure to pay as aforesaid by said defendants, or either of them, that the lot and improvements in said mortgage, from said Mattox to said complainants, be sold by the sheriff of this county as lands are sold upon execution issued from the common law side of this court, and that out of the proceeds of such sale the sheriff pay the said complainants the said sum of one thousand and sixty dollars and forty-four cents, together with interest thereon, at the rate of ten per centum per annum from the date of this decree until paid, and that an order of this court be issued accordingly. And it is further ordered and decreed, that said complainants recover from each of said defendants respectively, the costs by them expended in the prosecution of this bill against each of said defendants. It is ordered, that if there shall be any overplus arrising from the sale of said premises over and above paying the debt due to the complainants from said Mattox, that such overplus shall first be applied to the payment and discharge of the mortgage from said Mattox to Smith, and if any overplus, after satisfying said mortgage to Smith, the same to be applied to the satisfaction of the mortgage from Mattox to Sloan, and any remaining overplus to be paid over to said Mattox; and it is further ordered, that execution *issued* against each of said defendants, Smith and Sloane, for the costs chargeable against them by this decree.

Thereupon the attorneys for the defendants give notice of an appeal to the Supreme Court—bond filed and appeal granted.

Appeal bond—*Appeal bond.*

Know all men by these presents, that I, William B. Smith, James Sloane, of the county of Dubuque, Iowa Territory, and Ezekiel C. Dougherty and William C. Stoddart, of the same place, are held and firmly bound unto John Warburton, Hezekiah King, Job P. Doane and Wyllis King, in the penal sum of two thousand dollars, to the payment of which we bind ourselves, our heirs, executors and administrators, firmly by these presents. Signed and sealed by us, this twenty-third day of February, in the year of our Lord one thousand eight hundred and forty-two.

Whereas the said John Warburton, Hezekiah King, Job P. Doane, and Wyllis King filed their bill in the district court of the county of Dubuque, on the equity side of said court, to foreclose the equity of redemption on a mortgage executed by Edmond Mattox to said complainants, and in which said suit they also impleaded Smith and Sloan as subsequent mortgagees, defendants; and whereas, also, the said district court, sitting as a court of chancery, has rendered a decree against said Smith and Sloan, and the said Smith and Sloan impleaded with Edmond Mattox, appealed from the decision of said court to the su-

preme court of the Territory of *Iowa*. Now, therefore, if the said Smith, [and] Sloane, shall prosecute such appeal to effect, without delay, and pay to the opposite party the amount of said decree, with all costs, interests, and damages that may arise in the supreme court, in consequence of such appeal, in the event that the decree of the district court shall be affirmed, then this obligation to be void, otherwise to remain in full force and effect.

W. B. SMITH, [L. S.]
JAMES SLOAN, [L. S.]
E. C. DOUGHERTY, [L. S.]
W. C. STODDARD. [L. S.]

Signed, sealed, and delivered in the presence of—
J. V. BERRY.

On the back of which said appeal are the following words and figures to wit: "Presented and approved of, and filed, this 23d February, 1842.
P. S. DADE, *Clk D. C.*

TERRITORY OF IOWA, *Dubuque county, ss:*

I, Warner Lewis, clerk of the district court for the county of Dubuque, and Territory aforesaid, do hereby certify, that the foregoing is a full, true, and correct transcript of all the proceedings, records, and files, of the foregoing cause, wherein John Warburton, Hezekiah King, Job P. Doane, and Wyllis King, are complainants, and Edmond Mattox, William Smith, and James Sloane, are defendants.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at Dubuque, this 2d day of January, 1843.
WARNER LEWIS, *Clk D. C.*

Endorsed: Filed January 17th, 1843.
GEO. S. HAMPTON, *C. S. C.*

The defendants also filed the following assignment of errors herein, to wit:

SUPREME COURT, IOWA TERRITORY—*January Term*, 1843.

*Assignment of Errors.*

William B. Smith and James Sloan, impleaded with Edmond Mattox, appellants,
*ads.*
John Warburton, Hezekiah King, Job P. Doane, Wyllis King, appellees.

Afterwards, to wit, on the first Monday of January, in the year of our Lord one thousand eight hundred and forty-three, in this same term, before the judges of the Supreme Court aforesaid, at the Capitol, Iowa City, in the Territory of Iowa, came the said defendants, by John V. Berry, their solicitor, and say that, in the record and proceedings aforesaid, and also in the giving of judgment or decree aforesaid, there is manifest error in this, to wit: that the legal or better title is in the defendants impleaded as aforesaid, and the equities being equal, the legal

title must prevail. There is also error in this, to wit, that the record of the mortgage deed to the complainants on the county records of Dubuque county, was no notice to the defendants of the complainants prior purchase or mortgage, because the title is yet in the United States, and no such records of transfer of property yet in the United States opperate as a notice to subsequent purchasers, mortgagees, or assignees, because all registry acts of this description are unknown to the laws of the United States, and are of a local origin, and operate as an interference on the part of the local authorities with the primary disposal of the soil. That no record of sales or transfers can, as long as the title remains in the United States, be binding upon subsequent purchasers, mortgagees, or assignees, as affording *constructial* notice, except such records as are known to the laws of the United States through the General Land Office department; and therefore the defendants, impleaded as aforesaid, are entitled to be protected, as, in no event, subsequent purchasers, mortgagees, or assignees, for a valuable consideration, because they had no notice; and the complainants do not alledge that the defendants, impleaded as aforesaid, had notice of the existence of the complainants' mortgage at the time of the transfer to the said defendants.

There is error in this: That the district court, sitting as a territorial court, has no right to foreclose the equity of redemption, and order a sale, under a decree, by virtue of the laws of the Territory operating and creating a title, by virtue of the laws of the Territory, in opposition to the laws of *of* the United States.

There is error in this: The decree and sale under it create or originate a title through the Territorial laws, in opposition to a title acquired by and under the laws of the United States.

There is error in this: The district court has no jurisdiction over cases, or a right to interfere in cases where the title to land comes in question, while the *plenum dominium* remains in the United States, and the title has not passed out of the United States. Therefore, in all these things there is ma[n]ifest error, and this they, the said William B. Smith and James Sloan, impleaded as aforesaid, are ready to verify. Wherefore, they pray that the judgment or decree aforesaid, for the errors aforesaid, may be revoked, annulled, and altogether held for nothing; and that they may be restored to all things which they have lost by occasion of the judgment or decree aforesaid, &c.

JOHN V. BERRY, *Solicitor.*

And afterwards, to wit, at a supreme court, continued and held in and for Iowa Territory, at Iowa city, on the 17th day of January, 1843:

This day came the appellees by their solicitor, and mooved the court to dismiss the appeal herein, with damages, for reasons on file.

*Motion to dismiss appeal.*

Warburton and King, *vs.* Edmond Mattox and others. } In chancery, on appeal.

Appellees moove to dismiss this case, because no transc[r]ipt of the

record of said case was filed in this case, within the three first days of the last July term of this court.

DAVIS & CRAWFORD,
*Solicitors for appellees.*

And afterwards, to wit, at a Supreme Court, continued and held as aforesaid on the 10th day of May, 1843:

This day this cause came up for hearing, and the court having heard the arguments of counsel on both sides, took the same under advisement.

And afterwards, to wit, at a supreme court, continued and held as aforesaid, on the 5th day of January, 1844.

This day came the defendants, by their solicitor, and gave notice of their intention of appealing from the decree of this court rendered herein to the Supreme Court of the United States.

And afterwards, on the 10th day of January, 1844, the defendants filed herein the following affidavit, to wit:

TERRITORY OF IOWA, *ss:*

Supreme court, January term, in the year of our Lord one thousand eight hundred and forty-four.

Edmond Mattox, William B. Smith, and James Sloan, appellants, *ads.* John Warburton, Hezekiah King, Job P. Doane and Wyllis King, appellees. } In equity.

*Affidavit.*

TERRITORY OF IOWA,
*County of Johnson, ss:*

William B. Smith, one of the above named appellants, being duly sworn, says: That the amount in controversy, between the parties in the above entitled cause, is more, or exceeds the sum of one thousand dollars, exclusive of costs.

W. B. SMITH.

Sworn and subscribed to, before me, this 10th day of January, 1844.
Teste: GEO. S. HAMPTON, *C. S. C.*

And afterwards, to wit, at a supreme court, continued and held as aforesaid, on the 13th day of January, 1844.

*Decree and opinion of the court.*

This cause now coming on for hearing, and the court being sufficiently advised of and concerning the premises, delivered an opinion of the court, on the 4th instant, affirming the decree of the court below, to wit:

The mortgage from Mattox to the complainants was executed on the twenty-fourth of March, 1840, before the title of the land was obtained

from the United States, and was duly recorded, as appears by the admission of parties. On the 4th of April following Fasset & Sherman entered the land at the land office, and on the 7th of the same month conveyed the same to Mattox. On the 15th of the same month, Mattox mortgaged the same land to Smith, and on the 12th of November following to Sloane the other defendant.

What is the effect of recording such a mortgage as that given to the complainants? The thirtieth section of the act to regulate conveyances, (laws of 1840, page 39,) declares that the recording of such instruments shall impart notice to all the world of the contents thereof. The defendants, Smith and Sloane, must therefore be regarded as knowing, at the time they received their respective mortgages, that this previous mortgage had been executed to the complainants, under the circumstances above stated. It will become necessary, therefore, to inquire into the nature and effect of the mortgage itself. It states, among other things, that the party of the first part, "*does grant, bargain, and sell*, unto the said party of the second part, &c." The sixth section of the act to regulate conveyances, (laws of 1840, page 36,) defines the effect of such a clause in an instrument of this nature, as importing the following covenants: 1st. That the grantor had a fee simple title. 2d. That it was unincumbered; and 3d. For further assurance, a mortgage, therefore, containing all these covenants, was executed by Mattox to complainants, while as yet he had no title. He afterwards acquired title, and subsequently mortgaged the same premises to Smith and Sloane, they being fully informed of the aforementioned circumstances. Much stress was laid upon the fact, that at the time of the first mortgage the title was in the United States. I conceive this is not material. The important fact is, that it was not then in Mattox. It matters not where else it was. It is also contended, that inasmuch as the defendant, Mattox, had no title when he executed the mortgage to the complainants, the registry thereof was no notice. It is true, that the registry of a deed not required by law to [be] registered, is not notice to all the world.—1 *Story*, 404. I think, however, this case does not fall within the rule. This is clearly such an instrument as the law contemplates. I find nothing in the statute excluding cases of this nature from the benefits of the law relative to the effect of registry. It provides that every instrument in writing that conveys any real estate, or whereby any real estate may be affected in law or equity, proved, or acknowledged, and certified, in the manner above prescribed, shall be recorded, &c.—*Laws of* 1840, *page* 39, *section* 29. This is clearly such an instrument as may affect real estate "in law or equity," and therefore comes within the scope of the registry law. If a deed of warranty therefore be executed and duly recorded, while the grantor has no title, and full title be subsequently acquired by him, this enures to the benefit of the grantee, the registry also protects him against all subsequent purchasers. But if the deed were a mere quit claim, the subsequently acquired title would not enure to the benefit of the grantee in the quit claim deed,

and consequently a registry of such deed would not prejudice the rights of a subsequent purchaser.

Is the mortgage to the complainants to be regarded in this particular as a quit claim, or deed of warranty? I think the latter, unquestionably. We have seen that this mortgage contains what is tantamount to express covenants of full unincumbered title in the grantor, and also for further assurance. Whether this is sufficient to vest him with a legal title upon Mattox, subsequently obtaining the fee simple, is immaterial. At least the mortgagees have an equity superior to that of the defendants, Smith and Sloan, who took their respective mortgages with full knowledge of the rights of the complainants.—See 1 Pow. on Mortgages, 198.

I, therefore, think the decree in this case should be affirmed.

It is therefore considered by the court, that the decree of the court below be affirmed, and that a writ of procedendo issue accordingly, and that the complainants recover of the defendants the costs herein expended in this court, and that an execution issue for the same. And afterwards, to wit, on the 1st day of February, 1844, the defendants, William B. Smith, filed herein the following appeal bond, to wit:

*Appeal bond.*

Know all men by these presents, that we, William B. Smith, of the city of Dubuque, Iowa territory, and Timothy Fanning, of the same place, are held and firmly bound unto William Thomas Carroll, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said William Thomas Carroll, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-ninth day of January, in the year of our Lord one thousand eight hundred and forty-four.

Whereas, lately, at the January term of the supreme court of the Territory of Iowa, in the year of our Lord one thousand eight hundred and forty-four, at the capitol in Iowa city, in a suit pending in said court wherein William B. Smith, impleaded with Edmond Mattox and James Sloan, was appellant in chancery, and John Warburton, Hezekiah King, and Job P. Doane were appellees in chancery, and a decree was rendered against the said William B. Smith, impleaded as aforesaid; and the said William B. Smith, having obtained leave to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the Supreme Court of the United States, to reverse the decree in the aforesaid cause.

Now, the condition of the above obligation is such, that if the said William B. Smith shall well and truly pay, or cause to be paid, to the said William Thomas Carroll, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said William Thomas Carroll, clerk as aforesaid, and chargeable to the said William B. Smith

in the prosecution of the said appeal, then the above obligation to be void, otherwise to remain in full force and virtue.

TIMOTHY FANNING, [L. S.]
W. B. SMITH. [L. S.]

Signed, sealed, and delivered in the presence of—
JNO. V. BERRY.

I approve of the above bond, January 29th, 1844,
T. S. WILSON, *Asso. Judge sup. court.*

Endorsed.—Filed in my office February 1st, 1844.
Teste: GEO. S. HAMPTON, *C. S. C.*

UNITED STATES OF AMERICA, *Territory of Iowa, ss:*

I, George S. Hampton, clerk of the supreme court in and for the Territory aforesaid, do hereby certify, that the foregoing thirty-six, and this page hereto attached, contains a full, true, and complete transcript of the record and proceedings had therein between the parties therein named, as full, true, and complete as the same remains on file, or of record, in my office.

In testimony whereof, I have hereunto set my name and affixed the [L. S.] seal of the said supreme court. Done at Iowa city, this 21st day of October, A. D. 1844.

GEO. S. HAMPTON,
*Clerk of the supreme court, Iowa terr'y.*

Filed, Jan'y, 15, 1845.